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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 582

ARTHUR WALTER SEED COMPANY,
A CORPORATION,
Petitioner,

vs.

KENNETH R. McCLURE, COUNTY TREASURER OF KNOX COUNTY, INDIANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

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The petitioner, Arthur Walter Seed Company, respectfully files this Reply to Respondent's Brief in Opposition in order to draw the Court's attention to various parts thereof which might otherwise misdirect or mislead the Court in its consideration of the disposition of this case.

I.

At page 2 of respondent's Brief in Opposition, the Questions Presented by the Petition for Writ of Certiorari herein are restated. The second and third Questions

so offered by respondent are unfairly phrased in that they improperly usurp the functions of this Court and attempt to predetermine the factual questions which are the subsubject matter of this proceeding, *i. e.*, the reasons shown by or inferred from the allegations of the complaint for the temporary interruption of the shipment. Whether or not these reasons are such as to preserve the interstate character of the shipment while the goods were temporarily at rest is a matter to be decided by this Court.

Respondent's second Question states that the interruption was "for the *convenience* of the seller," and his third Question states that the interruption was "for *convenience* only in making the goods available for delivery in orderly fashion." To the contrary, the Complaint alleges that the early shipment (and consequent interruption) was made so that the corn would be available for delivery in an orderly fashion at the specified time against orders previously received, and was "*necessary* to permit an orderly distribution of (petitioner's) products in interstate commerce, otherwise unfavorable weather conditions in the spring of the year might prevent the (petitioner) from delivering said corn in accordance with said Illinois contracts." (Complaint, Paragraphs 7 and 8; R. 7; Appendix to Petition ii-iii.)

Accordingly, the Questions Presented are properly set forth in the Petition for Writ of Certiorari filed herein, and necessarily embrace the subsidiary question of whether or not the facts alleged in or inferred from the Complaint to which the demurrer was addressed established that the goods were still in interstate commerce, although temporarily at rest.

II.

Throughout the Brief in Opposition the respondent seeks to create the impression that the interruption of the shipment of the seed corn from the Illinois seller to the Indiana buyer occurred primarily for the business advantage and benefit of the petitioner. Such a conclusion has no support whatever in the record.

The respondent relies principally upon the case of *Norton Co.* v. *Department of Revenue*, 340 U. S. 534, 95 L. Ed. 517, 71 S. Ct. 377, and the case of *General Oil Co.* v. *Crain*, 209 U. S. 211, 52 L. Ed. 754, 28 S. Ct. 475, for the proposition that the interruption in the shipment of the seed corn was for the business advantage of the petitioner. Both cases are distinguishable, the *Norton* case having been discussed in the Petition for Writ of Certiorari (Pages 9 and 10), and the *Crain* case having been cited therein (Page 7).

In the *Norton* case the state tax which was upheld was a tax upon persons engaged in the business of retail selling, and there was evidence in the record of the taxpayer's sales and service activities in the state. This is substantially different from the factual situation in the case now before this Court, which involves an *ad valorem* property tax. The Complaint to which the demurrer was filed states a prima facie case for the constitutional protections invoked since it alleges that the early shipment and interruption in transit was "necessary" for the orderly distribution of the goods in interstate commerce, and there is no evidence that the petitioner engaged in sales or processing activities in Indiana.

In the *Crain* case cited by respondent the taxpayer, upon receipt of oil in Tennessee from other states, unloaded it into two containers, one of which was marked as oil al

ready sold in other states and the other of which was marked as oil to be sold in other states. This Court upheld the constitutionality of a Tennessee inspection tax on all of the oil. However, 21 years later, in the case of *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95, 73 L. Ed. 626, 49 S. Ct. 292, this Court distinguished the *Crain* case and narrowly limited its application. In the *Vial* case oil was sent from other states into Louisiana and there placed in storage tanks to await transportation facilities for export. The shipper always had orders on hand in excess of the quantity of oil awaiting transportation facilities. This Court held that the oil was still in transit in interstate commerce, even though temporarily stored in tanks awaiting delivery, and held that the attempt of Louisiana to levy personal property taxes thereon was unconstitutional. In the *Vial* case this Court stated that the actions of the taxpayer in the *Crain* case in separating the oil into various containers after receipt thereof in Tennessee was a local business activity for the benefit of the taxpayer so as to support the state tax. The opinion of this Court in the *Vial* case concludes with the statement (279 U. S. 95 at 109):

> "Whatever hesitation might be prompted in deciding this case, if the *Crain* case stood alone, the effect of the decisions of this Court since is such as to make it inapplicable to the case before us."

The case now before the Court presents a factual situation which is remarkably similar to the later *Vial* case, where oil was stored temporarily while awaiting delivery against orders previously received. It does not resemble the *Crain* case where the taxpayer's separation of the oil into separate containers was considered sufficient to uphold the tax.

The contention by respondent that petitioner's Indiana warehouse facility provides a "most valuable advantage,

placing it upon equal terms with local concerns as respects delivery" (Respondent's Brief, page 9) is without merit and disregards the fundamental purpose of the commerce clause. A state is not required to give an active advantage to interstate trade, but it cannot constitutionally control or tax it merely because it competes with local trade, or because local trade is so controlled or taxed.

Freeman v. *Hewitt*, 329 U. S. 249, 91 L. Ed. 265, 67 S. Ct. 274.

III.

A substantial number of the other cases cited by respondent in his Brief in Opposition for the proposition that interstate commerce in this case had ceased involve a question of whether a railroad was entitled to receive interstate or intrastate rates from a shipper, or a question of whether or not a particular transaction was in interstate commerce for the purposes of the anti-trust laws.

In the rate cases the results can be distinguished either on the ground that the interruption in transit was for the benefit of the shipper or, as stated by the Court of Appeals in one of the cases cited by respondent (*Atlantic Coast Line R. Co.* v. *Standard Oil of New Jersey* (C. C. A. 4th), 12 F. (2d) 541 at 548):

> "While in the business of buying and selling goods, interstate commerce may reach all the way from the first purchase to final delivery, interstate transportation for the purposes of determining the rate to be charged may have narrower limits."

In an anti-trust case with a factual situation similar to the present case, this Court held that interstate commerce did not end with the delivery of films from out of

state to a local agency of the shipper, to be held by the agency until delivery to the local lessee at a later date.

Binderup v. *Pathe Exchange*, 263 U. S. 291, 68 L. Ed. 308, 44 S. Ct. 96.

CONCLUSION.

It is respectfully submitted that the foregoing consideration warrant allowance of the writ sought by petitioner.

Respectfully submitted,

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